

D7f9cols1

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

07 CR 1170 (LAP)

5 JOSEPH P. COLLINS,

6 Defendant.

7 -----x

8 New York, N.Y.

9 July 15, 2013

2:33 p.m.

10 Before:

11 HON. LORETTA A. PRESKA

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the

16 Southern District of New York

17 HARRY A. CHERNOFF

18 MICHAEL LEVY

EDWARD IMPERATORE

Assistant United States Attorneys

19 COOLEY LLP

Attorneys for Defendant

20 WILLIAM SCHWARTZ

21 JONATHAN BACH

D7f9cols1

Sentence

(In open court; case called)

THE COURT: United States against Joseph Collins.

Is the government ready?

MR. CHERNOFF: Yes. Harry Chernoff for the government. With me at counsel table is AUSA Michael Levy, AUSA Edward Imperatore, Postal Inspector Katherine Searles, and Postal Inspector Edward Clark. Good afternoon.

THE COURT: Good afternoon.

Is the defense ready?

MR. SCHWARTZ: Yes, your Honor. William Schwartz for Joseph Collins, together with Jonathan Bach.

THE COURT: Good afternoon, Mr. Schwartz.

MR. CHERNOFF: I'm sorry, your Honor. I meant Robert Clark. In my haste, I changed his first name.

THE COURT: I knew that.

MR. CHERNOFF: Sorry, your Honor.

THE COURT: Mr. Schwartz, have you and your client had adequate time to review the presentence report?

MR. SCHWARTZ: We have, your Honor.

THE COURT: Is there any reason it should not be made part of the record?

MR. SCHWARTZ: There is not, your Honor.

We've sent you the objections that we have, in particular, objection to the presentence report relying on Mr. Collins having somehow been involved in fraud involving a

D7f9cols1

Sentence

1 revolving loan, counts of which were dropped from the
2 indictment.

3 THE COURT: Have you had a chance to confer with the
4 government on this one?

5 MR. SCHWARTZ: We have not, your Honor. We have not
6 conferred.

7 THE COURT: Is this something you want to be heard on
8 now or are you asking for a modification of the report? What
9 would you like?

10 MR. SCHWARTZ: I would ask that your Honor not rely on
11 that part of the report and make that clear on the record.

12 THE COURT: Mr. Chernoff.

13 MR. CHERNOFF: Your Honor, we don't rely on that
14 allegation so we have no problem with the defense suggestion.

15 THE COURT: Granted.

16 Are there other objections to the presentence report
17 that you would like to be heard on?

18 MR. SCHWARTZ: No, your Honor.

19 THE COURT: Thank you.

20 With respect to the offense level computation, I
21 accept the findings of the presentence report set forth at
22 paragraphs 93 through 107 which conclude that a total offense
23 level of 49 is appropriate.

24 With respect to the defendant's criminal history, I
25 accept the findings of the presentence report set forth at

D7f9cols1

Sentence

1 paragraphs 108 through 110 which conclude that a criminal
2 history category of I is appropriate.

3 I have the defense sentencing memorandum, a very large
4 package of defense letters, a smaller unbound package of
5 defense letters, the government's sentencing memorandum, and
6 the defense reply sentencing memorandum.

7 Are there any additional materials I should be looking
8 at?

9 MR. CHERNOFF: No, your Honor.

10 MR. SCHWARTZ: No, your Honor.

11 THE COURT: Very well.

12 Mr. Schwartz, would you like to speak on behalf of
13 Mr. Collins.

14 MR. SCHWARTZ: Yes, your Honor.

15 THE COURT: Before you start, counsel, I'd like to
16 thank you both for the most impressive sentencing materials.
17 They are probably some of the best -- they are certainly some
18 of the best I've ever seen. They might be the best.

19 MR. SCHWARTZ: Your Honor, I know it's often said by
20 judges whom I have talked to and whom I know that the most
21 difficult thing someone in your Honor's position has to do is
22 to sentence someone. It's less often said, but equally true,
23 that the most difficult thing someone in my position has to do
24 is stand before the Court and urge upon the Court why the
25 sentence should not be a severe one. And that's particularly

D7f9cols1

Sentence

1 true in this case, your Honor.

2 No one can possibly know a defendant the way a
3 criminal defense lawyer gets to know a defendant, particularly
4 in a case like this that has stretched over so many years. I
5 have seen Mr. Collins in circumstances that I would hope that
6 none of us would ever have to go through. And, of course, in
7 his case there is a particular empathy because we share a
8 profession and I would say, your Honor, we share a love of that
9 profession. I have spent thousands of hours with him and with
10 his family not just learning the substance of the case but
11 understanding the substance of the man. And what makes this
12 sentence particularly difficult for me, and I think for
13 Jonathan, is after representing him since October 2005, almost
14 eight years, is our abiding belief in his innocence.

15 We've made, as your Honor has noted, a very extensive
16 sentencing submission to the Court in which we give the Court
17 an extended view of how we interpreted the jury's verdict and
18 how we see the evidence in the case. And I'm not going to
19 rehearse that here today again, your Honor. I'm not going to
20 delve into the facts of the case except to say the following.
21 It was clear to us watching this jury that this was not a
22 simple verdict, an easy verdict for them to render. And
23 whatever happened here, whatever their verdict means or doesn't
24 mean, the one thing that I think is absolutely true in this
25 case about a fraud where investors were defrauded of billions

D7f9cols1

Sentence

1 of dollars, is that whatever it is the jury decided Joseph
2 Collins did or did not do -- and I think in this case the words
3 "did not do" are appropriate -- he did not act in any sense out
4 of greed or self-interest. And immediately that puts this case
5 on a different footing from almost any case I have ever been
6 involved with. And I would dare say virtually any white collar
7 case in which your Honor has rendered a sentence, particularly
8 one involving a massive fraud.

9 There simply was no evidence that he either sought to
10 or did benefit from the crime that was committed at Refco. It
11 would not only be inconsistent with the evidence in this case
12 to suggest to the contrary, your Honor, but it's inconsistent
13 with the character of the man who has been presented to you in
14 the 140-some-odd letters that we supplied to the Court.

15 It's inconsistence with the extraordinary way in which
16 he has given away his money to causes that he has deemed
17 worthy. Very often and mostly quietly. And inconsistent with
18 the extraordinary good deeds that I'll talk a little more
19 about.

20 This case, as your Honor can imagine, has had an
21 enormous impact. And what I'm going to talk about is the man
22 who, unfortunately, while we have tried to have your Honor get
23 to know him as well as we do, I want to make sure that we
24 convey the feelings we have about him.

25 This case has taken an enormous toll on his life. It

D7f9cols1

Sentence

1 was over six years ago when he was -- when we received a call
2 from the United States Attorney's Office and were told that
3 somebody whom we had perceived as a witness in their case had
4 now become a target of the case. And he has managed those six
5 years, despite the toll, to go through this with enormous
6 equanimity, never bowing to the pressure, always moving
7 forward.

8 His career is over. I think your Honor can tell from
9 the letters from his family and the letters from his colleagues
10 what the law and the practice of law meant to him and what he
11 had achieved in the profession. That ended with his indictment
12 in December 2007, as did his standing in the profession. Never
13 to be recovered.

14 I think, your Honor, that that loss is far more
15 significant to Joe Collins, from what I know of the man, than
16 the loss of the earning power that went with that.

17 Now I also understand that in every case, as I have
18 done in the past, and others, a lawyer stands here and says
19 that the case is having an enormous impact on the man. What's
20 extraordinary in this case is how Joe Collins reacted to the
21 events that took place in his life and what that says about his
22 character, both before and after Refco. It speaks volumes for
23 who he is.

24 Your Honor has the letters from the Chicago Jesuit
25 Academy. In December when Joe Collins took a leave of absence

D7f9cols1

Sentence

1 from Mayer Brown he resigned his partnership after his first
2 conviction, December 2007, faced with time on his hands,
3 something he had never had before. He knew how to fill it.
4 And he volunteered that time to give it away in a most
5 extraordinary way, in a way that has had an impact on the lives
6 of many young people who have gone through that academy in the
7 six years that he's been there three days a week. It is
8 something that often defendants might do because they fear this
9 day and they want to have something positive to say to the
10 Court. But I think that your Honor can tell from the other
11 letters about Mr. Collins that that had nothing to do with it.
12 In fact, Jonathan and I did not even know that Joe had done
13 this until sometime after he began volunteering, which is also
14 consistent with the quiet way in which he's led his life. But
15 that act, fill my time by giving to others even while I'm under
16 the most immense personal pressure that can be imagined, is
17 consistent with the way he's lived his entire life.

18 It's consistent with taking in a young, troubled high
19 school student who was a friend of one of his sons, to save him
20 in his senior year of high school by allowing him and helping
21 him live in the Collins family when his home had fallen apart
22 and to somehow manage to survive because of Joe Collins and
23 move on to college and a career.

24 It is consistent with giving both money and time for
25 an Eritrean refugee trying to find her place in the country and

D7f9cols1

Sentence

1 not just letting it go with a few dollars towards her high
2 school education but taking her under his wing as a mentor and
3 having an impact that would change her life.

4 It's consistent with Joe Collins offering to be a
5 foster parent for another friend of one of his sons when that
6 friend's family, when there was a death in the family.

7 It's consistent with Joe Collins quietly paying for
8 the funeral of a parent of one of his sons classmates, without
9 telling even his wife, so that that woman who had lived a
10 troubled life could be buried in dignity.

11 That's the Joe Collins that I know, your Honor.
12 That's the Joe Collins that volunteered to work at the Chicago
13 Jesuit Academy when he had time on his hands.

14 Now, there is no way to summarize in a few words what
15 the letters say about him. One of the things that struck me
16 over the weekend as I was rereading them was the repetition of
17 certain words. I don't have them all, but here are some:
18 Humility, church, faith, generosity, giving, family, integrity,
19 role model. 140 people who used those words over and over
20 again whose lives have been changed.

21 Let me talk about his family. Joe Collins was a
22 lawyer who sometimes billed up to 2500 hours a year. We all
23 know what that is like. Hopefully we don't know it too often.
24 But what does his family say, and friends of the family? He
25 never missed a game of any of his sons. He never missed an

D7f9cols1

Sentence

1 event that was important to them. He never missed being there
2 when they needed him to show him the way. He did not miss
3 Steve Lake's SATs when he felt it was required for him to sit
4 outside so that Steve wouldn't run away. Joe Collins has given
5 himself to his family in a way that is just extraordinary.

6 You've seen the impact from their letters, and from
7 the letters of his daughters-in-law, on his sons.

8 Your Honor, this sentencing takes place exactly at the
9 time where he's able to begin to have the same kind of impact
10 on his grandchildren, and we ask that your Honor consider that
11 in passing sentence today.

12 You've heard from his wife of 40 years, his childhood
13 sweetheart, about this extraordinary relationship. And Mary
14 Pat has been here through two trials and stood by Joe every
15 inch of the way. And that relationship is a testament not just
16 to Mary Pat but to Joseph Collins and what he inspires in
17 people.

18 We who are parents can only hope that some day we can
19 hear the things from our children said about us that Joseph
20 Collins' children have said about him.

21 You've heard, your Honor, from his colleagues at the
22 bar, both his adversaries and his cocounsel. And one of the
23 words that pops out of all of their letters is integrity. He
24 was perceived by the people that he worked with day in and day
25 out as being a lawyer of the highest -- not only skill but

D7f9cols1

Sentence

1 integrity.

2 We've heard from his partners -- and what often
3 happens in these cases, your Honor, there is no reason -- of
4 course, someone might argue there are legal interests that are
5 aligned, but there is no reason for the partners to have said
6 what they have said about him other than from the deepest of
7 feelings. Mayer Brown faces crippling lawsuits as a result of
8 Refco. Are his partners bitter? His partners are anything but
9 bitter. They are supportive in the most deep personal way.
10 And that, your Honor, is because Joe Collins touched them
11 through his many years of partnership the way he touched us
12 through the years that we represented him.

13 Those partners, including two former assistant U.S.
14 attorneys, one of whom, like I, was privileged to serve in this
15 office, those partners say only the most extraordinary things
16 about him. As do his friends. Whether it's going back to
17 childhood or to the incredible relationships that he made at
18 college, including with a friend of mine, Ted Wells. They all
19 have come forward to talk about Joe and what their perception
20 of Joe was as a leader in the college, as someone who, even at
21 the time, was clear that he -- he felt that there was service
22 to be done in a college that emphasized service. And, your
23 Honor, as someone who went to college at the same time as Joe,
24 I can tell you that putting on the uniform of the United States
25 military was not an easy thing to do when Joe was in college.

D7f9cols1

Sentence

1 And I've read a little bit about Holy Cross during that period.
2 It was not an easy thing to do there. And Joe Collins proudly
3 served his country in the ROTC and then later proudly served
4 his country as a captain in the Air Force because service is in
5 every fiber of his being.

6 Generosity. The statistics that were provided to the
7 Court about Joe's giving are also extraordinary. Always
8 approaching, sometimes exceeding ten percent of his after-tax
9 income. That is simply amazing. But that was simply to pay
10 back institutions that had helped him along the way,
11 institutions that he felt were helping others and touching
12 others. But it didn't stop there.

13 Every spare moment of Joe Collins' life has been
14 filled with service. Service to those less fortunate than he
15 is. I think Steve Lake has an extraordinary letter in which he
16 says at the end -- this is the young man whom he took into his
17 house at the most desperate time of his life, and he uses the
18 word generosity. "Put simply, without Mr. Collins' extreme
19 generosity and inspiring example I would not be where I am
20 today. Indeed, I do not know where I would be."

21 That's just Joe.

22 Or the boy, David, at Chicago Jesuit Academy, again,
23 somebody that Joe would not have told us about had they not
24 written their letters. Joe didn't tell us about any of those
25 things. It's only -- because he doesn't do that. It's only

D7f9cols1

Sentence

1 through our conversations with Mary Pat that we were able to
2 learn some of this.

3 The boy David, a troubled fifth grader. His uncle had
4 recently committed suicide, come from the same difficult
5 neighborhood on the west side of Chicago that the school is
6 located in that Joe has to drive an hour-and-a-half to get to
7 and is the site -- the area of many violent crimes, including
8 murders. The timing of Joe's assistance to this young boy,
9 David, is unbelievable. It was right before, right during, and
10 right after his trial in this courtroom. And as the letters
11 attest, he has had impact on David that none of the other 45
12 volunteers in that school have ever had.

13 But Joe is also the kind of person who doesn't insist,
14 I'm here, I want to tutor, I want to council. As your Honor
15 has seen from those letters, he performs janitorial duties.
16 Whatever is needed, Joe Collins is there, without complaint --
17 in fact, not only without complaint, with pride to do, to make
18 the world a better place.

19 You know I know him well enough to know -- although we
20 have never discussed this -- many of the letters talk about him
21 as a man of faith and a deeply, deeply devout catholic. That I
22 have seen. And I know him well enough to know that he quietly,
23 to himself, believes that these good works are some day going
24 to be taken into account by another judge on another day. And
25 I also know Joe well enough to know that he does not in any way

D7f9cols1

Sentence

1 presume to guess how they will be weighted in that judgment.

2 But your Honor I've represented him in this world.

3 And your Honor has to judge him in this world. If ever there
4 was a moment for someone's life and good acts to be taken into
5 account in this world, it's on this judgment day. We ask the
6 Court to please sentence Joe Collins to a noncustodial
7 sentence.

8 THE COURT: Thank you, Mr. Schwartz.

9 Mr. Collins, would you like to speak on your own
10 behalf.

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Yes, sir. Would you do it now, please.

13 THE DEFENDANT: I would like to thank my friends and
14 my family, especially my wife, for all the support and prayers
15 they have provided during this ordeal.

16 THE COURT: Thank you.

17 Does the government wish to be heard?

18 MR. CHERNOFF: Yes, your Honor. Thank you.

19 THE COURT: Yes, sir.

20 MR. CHERNOFF: Your Honor, I just want to comment
21 briefly on a couple points that were made in the defense papers
22 and also in the presentation here this afternoon.

23 The question of Mr. Collins' motivation has been
24 squarely litigated in the context of the sentencing and also
25 before the jury. And the assertion that Mr. Collins did not

D7f9cols1

Sentence

1 benefit from having Refco as his most important client, the
2 client that resulted in favorable compensation calculations.
3 We walked through before this jury, and as set forward in the
4 trial transcript, all the formulas that the firm used in
5 compensating him and all the hours that were billed by
6 Mr. Collins and by other lawyers at his firm to Refco. It's
7 clear that his financial incentive was not as great as some of
8 the people who were also convicted of these crimes. But it is
9 hard to imagine how one could conclude that he had no incentive
10 to do all of this work for all of this time and not just the
11 work that resulted in the charged offenses but all of the other
12 work from Refco that came with it and that Mr. Collins
13 benefited from and that his firm benefited from year after
14 year.

15 We've heard a lot of negative things, understandably,
16 expressed by the defense at trial and sentencing about the more
17 responsible perpetrators at Refco: Mr. Bennett, Mr. Trosten,
18 Mr. Maggio, Mr. Grant. But these were Joseph Collins' clients.
19 Those were the men, this was the company that was his primary
20 client, his primary focus over the many years that he worked
21 for Refco and over the many years that he committed these
22 crimes. This wasn't an aberrational act. This was something
23 that occurred year after year.

24 It's been suggested that the jury may have concluded
25 that Mr. Collins' failure to disclose the PPA was alone what he

D7f9cols1

Sentence

1 did wrong here. And your Honor will recall that the way the
2 government presented that argument at the first trial was
3 squarely debated in this trial in the context of the jury
4 charge. And the government never argued the case to this jury,
5 never argued that the PPA alone was the problem here, that it
6 was simply a difference of view as to whether something needed
7 to be disclosed, perhaps an honest disagreement among lawyers.

8 This is how the defense has tried to interpret the
9 jury verdict. And yet, the Court will ultimately decide what
10 the offense conduct was here by the preponderance standard.
11 And we have overwhelmingly presented the case, far surpassed
12 the standard, calling witness after witness that showed that
13 Joseph Collins could not have been ignorant of the hole; not
14 only because of direct conversations but because of documents
15 he worked on with lawyers like Earl Melamed involving the
16 buyouts of Mr. Grant, Mr. Dittmer, that showed that there had
17 to be this kind of a hole or else the relatively small amount
18 of money that they were taking out of the deal could not be
19 explained.

20 Joseph Collins knew this company well enough to know
21 that the hole existed from the documents he worked on, from the
22 conversations he had, and that was why he laid down a line in
23 disclosing the PPA, and fought with the other lawyers from
24 BAWAG who wanted to disclose it -- who thought it should be
25 disclosed.

D7f9cols1

Sentence

1 Your Honor, at sentencing it is difficult for all of
2 us to participate in the process to see a lengthy sentence
3 imposed on the defendant whose family and friends are in the
4 courtroom. This is a crime, though, where -- and I should note
5 so the Court knows from prior correspondence, we have updated
6 victims about this case and about these proceedings with our
7 web-based notification procedures. This is a case where the
8 victims number in the thousands and the losses number in the
9 billions. And if the victims actually did come to court we
10 couldn't do it in this courthouse. We did call a couple of
11 victims at trial as sort of illustrative examples. Your Honor
12 will recall the money that was lost by the pension fund
13 TIAA-CREF, Mr. Schaub an individual investor who lost thousands
14 of dollars of his own money investing in Refco. And I can
15 imagine how dispirited and how pessimistic and maybe how
16 cynical some of the investors in this company must feel after
17 the many years that it has taken to bring all the defendants to
18 justice, to bring Mr. Collins to this point.

19 And I would suggest, as we've argued in our papers,
20 that that pessimism, the cynicism is extremely strong here
21 because Mr. Collins is an attorney, because, as the Court has
22 determined in adopting the probation office's recommendation
23 with respect to use of a special skill, he employed his skills
24 as an attorney, as an attorney for an extremely prestigious
25 firm, a man with tremendous professional accomplishments, and

D7f9cols1

Sentence

1 he employed those skills to deceive others and to steal from
2 the victims in this case.

3 The lies that Mr. Collins engaged in in this case are
4 not just limited to the indictment. They are limited to his
5 prior testimony. And the defense suggests that because Judge
6 Patterson imposed obstruction on a different point than the
7 government had advanced, that he somehow decided that none of
8 the other points merited obstruction. And I would suggest that
9 the Court just didn't reach those points because the judge,
10 Judge Patterson, had made a finding with respect to this more
11 narrow point, which the defense is correct, we're not relying
12 on.

13 Mr. Collins, in the first trial, took the stand -- and
14 was on the stand I think for five days, between direct and
15 cross-examination -- and denied every aspect of the charges,
16 denied knowing about the hole, called the government's
17 witnesses liars. I think for a whole bunch of reasons he
18 decided to handle this trial differently. But that doesn't
19 mean that his attempt to obstruct justice in the first trial
20 can be put aside.

21 I think, although none of us were there at the first
22 trial -- I mean at the prosecution table and your Honor -- to
23 observe Mr. Collins' demeanor, we saw some of that in the hour
24 or so of civil deposition testimony that followed that
25 obstruction enhancement, the imposition of it, in which

D7f9cols1

Sentence

1 Mr. Collins continued his obstructive conduct.

2 MR. SCHWARTZ: Preceded.

3 MR. CHERNOFF: Sorry.

4 And so for that reason when we look at the prior trial
5 testimony which we submitted to your Honor and consider the
6 defendant's testimony under oath with regard to these matters
7 we would ask that the Court consider imposing the obstruction
8 enhancement and increasing the guidelines level from 49 to 51.

9 THE COURT: I think I've already ruled because I made
10 the finding, didn't I? There was no obstruction enhancement in
11 the presentence report, and for that reason I did not -- not
12 for that reason, but I certainly did not impose one.

13 MR. CHERNOFF: Understood, your Honor.

14 I didn't know if the Court had made --

15 THE COURT: Yes, sir.

16 MR. CHERNOFF: If I could just have a moment?

17 THE COURT: Yes, sir.

18 (Pause)

19 MR. CHERNOFF: Mr. Levy just points out I'm not sure
20 that the more recent PSR recited this language. In the PSR
21 from the first trial, the probation office said it would defer
22 the finding to the Court, as is their practice. That language
23 I don't think was in the more recent PSR, and I guess I just
24 didn't know --

25 THE COURT: I actually thought it was. At paragraph

D7f9cols1

Sentence

102, "there was no enhancement imposed."

MR. CHERNOFF: Yes, your Honor.

So we thought that that was the probation office again deferring to the Court. But I understand your Honor's ruling.

THE COURT: Yes, sir.

MR. CHERNOFF: And so in light of the defendant's conduct, his use of a special skill, sophisticated nature of this scheme, the duration that it occurred over, the sheer number of victims and loss, the need to deter this kind of conduct among all actors in the capital markets but particularly corporate lawyers, the government requests that your Honor impose a substantial term of imprisonment.

Thank you.

THE COURT: Thank you.

Mr. Schwartz, do you wish to comment further?

MR. SCHWARTZ: No, your Honor.

THE COURT: Very well. Then counsel I think it's clear by now that I have calculated the guidelines that are applicable and certainly take them into account.

With respect to the paragraph 3553(a) factors, looking first at the nature and circumstances of the offense. As we have discussed, the guidelines calculations here are technically correct. They result in a guidelines range that is several notches below the bottom of the guidelines chart, indicating a life sentence or 95 years if one considers the

D7f9cols1

Sentence

1 statutory maximums.

2 Such a prescription illustrates, "the harm that
3 guideline calculations can visit on human beings if not cabined
4 by common sense." United States v. Adelson, 44 is F.Supp. 2d
5 506, 512 (S.D.N.Y. 2006).

6 Off the record.

7 (Discussion off the record).

8 There is no doubt that the offenses of conviction here
9 were serious offenses in which major businesses and banks and
10 untold thousands of investors lost millions and millions of
11 dollars. Certainly Mr. Collins' role in the Refco fraud was an
12 indispensable role, that of preparing legal documents over
13 years for the transactions planned by company insiders to
14 effect the fraud.

15 Although critical, however, Mr. Collins' role was of a
16 different magnitude and clearly less culpable than that of the
17 other defendants. Unlike those defendants, Mr. Collins did not
18 devise, plan, or initiate any aspect of the fraud.

19 While that fact is probably not unheard of in fraud
20 cases, what takes this case far outside the heartland of fraud
21 cases, and particularly fraud cases involving lawyers, is that
22 Mr. Collins did not personally receive or even attempt to
23 receive any profit from the fraud. His lack of any intended or
24 actual personal gain from the fraud distinguishes him from the
25 other Refco defendants and from most other white collar

D7f9cols1

Sentence

1 offenders in this district.

2 It is undisputed that Mr. Collins' only income during
3 the period of the charged conspiracy was his law firm
4 partnership income. I certainly acknowledge the government's
5 point that without a client such as Refco that income might
6 well have been less, probably would have been. However, the
7 income he did receive was consistent with the income
8 partners -- other partners earned at similar types of law firms
9 and other than the general presence of the Refco client there
10 is no evidence that the amount of his partnership share from
11 the firm was dependent directly on fees from Refco. In
12 contrast, the other Refco defendants ranged from Mr. Bennett
13 who stood to make one billion dollars down to Mr. Maggio who
14 made a mere \$20 million. Accordingly, I find that the total
15 offense level far overstates the nature and circumstances of
16 the offense.

17 With respect to the history and characteristics of the
18 defendant, it can fairly be said that but for this matter
19 Mr. Collins is a certifiable saint. I echo Judge Rakoff's
20 recognition of Mr. Gupta's prior good works in saying that I
21 have "Never encountered a defendant whose prior history
22 suggests such extraordinary devotion, not just to humanity but
23 to individual human beings in their time of need." And I say
24 that having been here over 20 years. And unlike so many of the
25 defendants we see, Mr. Collins has worked for his church, his

D7f9cols1

Sentence

1 family, his schools, and numerous other deserving organizations
2 that work to better individuals' lives for decades. This was
3 not a postarrest conversion. Far from it. As counsel stated
4 this afternoon, every spare moment of his life has been filled
5 with service to his family, his country, his church, his
6 schools, and other deserving organizations.

7 As Mr. Collins' brother Austin writes, "Joe not only
8 takes his religion seriously, he lives it in the best and most
9 productive way possible. Joe walks the talk."

10 Mr. Collins has been a generous donor to charitable
11 causes. I note, as counsel has, that during the period of the
12 charged conspiracy his charitable giving approached or exceeded
13 ten percent of his after-tax income. His generosity, however,
14 has extended far beyond institutional giving. Over many years
15 he has repeatedly and continuously given of his own time and
16 energy in bringing about tangible change in the lives of
17 others.

18 We know, for example, that Mr. Collins took in his
19 sister and her two young children to his home following her
20 divorce. The letters of both children make it clear that they
21 regard Mr. Collins as a parents.

22 As counsel has noted, he also took into his home
23 Stephen Lake, a Loyola classmate of his son. Stephen's mother
24 was an alcoholic and incapable of caring for him. And but for
25 Mr. Collins, Stephen would have become a ward of the state and

D7f9cols1

Sentence

1 had to leave Loyola in his senior year. Stephen was a troubled
2 young man and needless to say the experience was challenging
3 for the Collins family. But, for Stephen Lake it was
4 transformative. He writes, "Almost immediately I went from
5 living in an environment of fear and abuse to living in a warm
6 and loving home. Mr. Collins provided for my care and support,
7 a selfless and heroic act in and I've itself. He also provided
8 me with the kind of role model I'd never had; knowing him
9 changed the entire trajectory of my life."

10 Stephen became a member of the Collins family, doing
11 his chores and participating in family events. Mr. Collins
12 mentored him in his studies, helped him to prepare for his SATs
13 and helped him look at colleges. Stephen eventually completed
14 college and is now a successful young man working with the
15 Chicago Board of Trade. He writes, "Mr. Collins taught me how
16 to treat others. First and foremost, the way he and
17 Mrs. Collins treated me was remarkable. The way Mr. Collins
18 treated others also made an impression on me. Although he was
19 a successful lawyer, he would accord everyone the same dignity
20 and respect. Most importantly, coming as I did from a broken
21 and dysfunctional home, Mr. Collins showed me what a true
22 family man looked like. Put simply, without Mr. Collins'
23 extreme generosity and inspiring example, I would not be where
24 I am today. Indeed, I don't know where I would be."

25 Mr. Collins has long been an active participant in

D7f9cols1

Sentence

1 LINK Unlimited, an educational sponsorship program serving
2 economically disadvantaged African-American youth in Chicago.
3 Through that program Mr. Collins made a commitment to
4 contribute to costs of private secondary education for Azmera
5 Berhe, who, with her family, was a refugee from civil war in
6 Eritrea. Just as importantly as school, however, Mr. Collins
7 came to know Azmera's entire family. She writes, "Joseph not
8 only mentored me but I became almost like a daughter and truly
9 felt they incorporated me into their family. I was included
10 and welcomed with open arms in many family occasions such as
11 Thanksgiving, Christmas and weddings. Joseph came to my home.
12 He met my family. We shared meals of Eritrean food. He
13 greatly admired my parents. Joseph introduced me to a life
14 where hard work, passion, and dedication were what determines
15 success in life rather than being a victim of circumstance."

16 Although Collins' obligations under LINK Unlimited
17 ended when Azmera started college, he continued to support her
18 and advise her and assist when she could not afford tuition.
19 The first package she received when she went to college was
20 from the Collins family and contained a new laptop. She has
21 since graduated from the University of Illinois with a degree
22 in community health.

23 Similarly, the Collinses have been active supporters
24 of Boys Hope/Girls Hope of Chicago, a scholarship program
25 serving at-risk children from Chicago's poorest neighborhoods.

D7f9cols1

Sentence

1 The Collinses' son Christopher introduced them to Boys
2 Hope/Girls Hope when he spent a year working there as a house
3 parent. Mrs. Collins serves as an unpaid program coordinator
4 and a mentor and tutor to students. And Mr. Collins has not
5 only supported the program financially but has given his time
6 to mentoring graduates.

7 Patrick's Hughes, executive director of Boys
8 Hope/Girls Hope writes that Mr. and Mrs. Collins are "the kind
9 of support you can count on to help our scholars when they need
10 it most."

11 Like the defendant in United States v. Adelson,
12 Mr. Collins' "good deeds were not performed to gain status or
13 enhance his image." As in Adelson, "most were unknown to all
14 but a few people until the time of his sentencing." This is in
15 stark contrast to many of the white collar defendants we see in
16 this Court who put their names on fancy buildings, which of
17 course is a very worthy cause, but it brings with it a certain
18 enhanced status. That was not the path which Mr. Collins has
19 followed for all of these years. The example that's already
20 been noted by counsel was that Mr. Collins paid for the funeral
21 of the mother of one of the Collinses' sons' classmates,
22 because the family could not pay for the funeral. Until the
23 pastor mentioned it, Mrs. Collins didn't know he had done that.

24 Mr. Collins has supported numerous other institutions
25 both financially and with his own time and effort, including

D7f9cols1

Sentence

1 the College of Holy Cross and New York University, both of
2 which he attended, Dominican College, Notre Dame University,
3 and Loyola Academy, the last of which his sons attended.

4 As counsel has also noted, following his indictment
5 Mr. Collins remained true to form. Of course, he left the
6 practice of law and since then has devoted his time to his
7 family and the service of his community. Since January 2008,
8 the month following his indictment, Mr. Collins has worked
9 three days a week as a volunteer and tutor at Chicago Jesuit
10 Academy, a full scholarship middle school located in a rough
11 neighborhood on Chicago's West Side. Nearly all of the school
12 students come from minority, single-parent families and almost
13 all live at or below the poverty line. When he is not actively
14 tutoring students, Mr. Collins willingly turns his hand to
15 office work, sweeping up, organizing supplies, or whatever else
16 might assist the school in performing its valuable mission.

17 Matthew Lynch, the school's president, describes
18 Mr. Collins as "One of our most reliable volunteers and
19 effective tutors. Joe is unfailingly kind, self-effacing and
20 generous. He graciously does whatever job needs doing. Given
21 the modest resources of our school, that means Joe's jobs vary
22 from cleaning up messes to tedious filing work, to the critical
23 work of tutoring a child in need. For over six years Joe has
24 done it all quietly, thoughtfully, and extremely well."

25 Mr. Lynch also points out that there are far easier

D7f9cols1

Sentence

1 and more comfortable opportunities open to Mr. Collins and
2 said, "We are far from his home and we're in a neighborhood
3 that most Chicagoans do their best to avoid. The neighborhood
4 that surrounds our school struggles under the weight of
5 material poverty, gangs, drugs, and violence. While Joe has
6 been a volunteer, we've had a volunteer mugged while walking to
7 our building at 9:00 a.m. In October 2011 two people were shot
8 an killed within a block of the school while school was in
9 session. Two of our students, who are brothers, lost their
10 biological father when he was shot less than four blocks from
11 our school. There are safer places to volunteer but Joe
12 believes in what we do and wants to help despite the risks."

13 As counsel has noted, Mr. Collins had notable success
14 with a particularly troubled CJA student whom he had regularly
15 counseled on a one-to-one basis for some months, leading up to
16 and since the recent trial. Clara Chu, volunteer coordinator
17 for CJA, describes the change that Mr. Collins' patience and
18 compassion have brought about for this child. "For one
19 particular fifth grader this year..." who she calls David but
20 isn't his real name "...this additional assistance has made a
21 remarkable difference in his success. For background, David's
22 uncle, a relative he considered close, committed suicide in the
23 summer of 2012 just before David was to begin his time at CJA.
24 The fall quarter was, needless to say, a difficult transition.
25 David made threats of self-harm, was admitted to a psychiatric

D7f9cols1

Sentence

1 center for children for three weeks, and even when he returned
2 in November showed signs of depression and need for high levels
3 of attention. Mr. Collins has been our reliable go-to
4 volunteer to help this young man obtain the attention he needs
5 with care and compassion. Mr. Collins has helped David in a
6 way that none of our other 45 volunteers has been able to. It
7 has been remarkable to watch them develop an understanding and
8 David knows that he can count on Mr. Collins. Whether helping
9 to lead a seventh grade field trip, preparing senior students
10 for their high school scholarship interviews, tutoring students
11 like David, or handling janitorial or administrative tasks,
12 Joseph Collins is an invaluable asset, our most dependable
13 volunteer, and an integral part of our school community."

14 In reviewing in my mind the letters, I do note what
15 counsel noted, that certain words appear continuously
16 throughout a hundred something letters: Humility, church,
17 generosity, giving, integrity, role model. Thus, in
18 considering Mr. Collins' history and characteristics, I find
19 his lifelong good works and charity to be extraordinary.

20 With respect to the seriousness of the offense. As I
21 noted above, this was indeed a serious offense imposing
22 financial losses on businesses and individuals of hundreds of
23 millions of dollars and, as the government points out in its
24 submission, raising doubts about the integrity of the capital
25 market system.

D7f9cols1

Sentence

1 As noted above, however, the certain nature and
2 circumstance of this defendant's offense are outside the
3 heartland of these types of serious offenses because of his
4 secondary role and because of the lack of any direct financial
5 gain.

6 As the government has pointed out, deterrence is
7 indeed a very important consideration in any sentencing but
8 particularly in white collar sentencings. I can say with great
9 certainty, based on his past history, that there is no need for
10 incarceration to protect the public from future crimes from
11 this defendant.

12 General deterrence, however, is also a very important
13 consideration in these cases. In considering the need for
14 incarceration for general deterrence, I adopt Judge Rakoff's
15 sentiment in the Gupta case that, "Common sense suggests that
16 most business executives fear even a modest prison term to a
17 degree that more hardened types might not. Thus, a modest
18 prison term should be sufficient but not more than necessary
19 for this purpose."

20 In United States v. Kipnis, No. 05 CR 727 (N.D. Ill.
21 Dec. 10, 2007), the Court noted that, "for a lawyer who is not
22 motivated by personal gain, the collateral consequences of
23 conviction provided general deterrence."

24 In addressing the defendant, the Kipnis Court noted,
25 "In looking at all that you have lost from where you were in

D7f9cols1

Sentence

1 life, I think that is a significant deterrent to others who are
2 thinking about engaging in a fraud the way that you have done
3 so, by drafting documents and not receiving a penny and helping
4 others to get money."

5 See also Adelson, 441 F.Supp. 2d at 514. "There is
6 considerable evidence that even relatively short sentences can
7 have a strong deterrent effect on prospective white collar
8 offenders."

9 Here, Mr. Collins has lost his law license and his
10 considerable standing in the legal community. To illustrate
11 the very long fall from grace, I note the letter of Hector
12 Gonzalez, formerly an Assistant United States Attorney in this
13 district and a former Mayer Brown partner, as he sums up the
14 partners' view of Mr. Collins. "Joe is, simply put, a good
15 man. During the more than twelve years that I've known Joe, I
16 never had a reason to call into question the settings on his
17 moral compass. Joe has never given me the slightest reason to
18 question his integrity. It is also fair to say that I am not
19 alone in holding that opinion. At Mayer Brown, Joe had a
20 reputation for honesty, integrity, and fair play, among both
21 lawyers and stuff."

22 Similarly, Vincent Connelly, a former Assistant United
23 States Attorney in Chicago where he was chief of special
24 prosecutions is a senior partner at Mayer Brown who worked
25 closely with Mr. Collins on Refco litigation matters. He

D7f9cols1

Sentence

1 describes work on a "bet the ranch" trial for Refco during
2 which he consulted Mr. Collins throughout. He found that
3 Mr. Collins consistently offered only ethical and responsible
4 advice. "Never did he seek even a borderline advantage for the
5 client if it wasn't well within appropriate boundaries of
6 proper advocacy."

7 Mr. Connelly observes, "Prior to working at Mayer
8 Brown I was a federal prosecutor in Chicago for ten years. I
9 don't think that experience provides me with any special
10 insight into human nature. But along with the following 25
11 years as a white collar criminal defense practitioner, it at
12 least affords me a filter to observe lawyers who try to do the
13 right thing and those who don't. Throughout the hundreds of
14 times Joe and I had to make decisions and plan a course of
15 action, he always was guided by doing what was proper and
16 aboveboard."

17 Along with losing his standing in the legal community,
18 Mr. Collins has also lost his ability to make a living. He
19 also faces a civil lawsuit that threatens to bankrupt him and
20 his family. His future earning power has been destroyed as he
21 and his wife enter their mid 60s with no income and probably no
22 assets. Thus, I conclude that in this case a lengthy prison
23 sentence is not necessary for general deterrence of similarly
24 situated individuals tempted to commit similar crimes
25 particularly in light of the collateral consequences suffered

D7f9cols1

Sentence

1 by Mr. Collins.

2 The paragraph (d) factors of providing education or
3 vocational training are not relevant here.

4 I've taken into account the paragraph 3, 4, and 5
5 factors.

6 With respect to paragraph 6, the need to avoid
7 unwarranted sentencing disparities. I acknowledge the serious
8 sentences received by the Refco insiders in this case;
9 Mr. Bennett was sentenced to 16 years and Mr. Grant to 10
10 years. As we know, Mr. Maggio has passed away and Mr. Trosten
11 has not been sentenced.

12 Of course I am to look not only to the defendants in
13 this case but to similar cases around the country. In doing
14 so, I am persuaded that there will be no perceived disparity
15 between the sentence given to Mr. Collins and the sentences
16 received by other similarly situated white collar defendants.

17 I've already made reference to United States v. Kipnis
18 and I look also to United States v. Graham, No. 06 CR 137 (D.
19 Conn. April 30, 2009) where the defendant lawyer was said to
20 have drafted the contracts to document the sham transactions in
21 a fraud case and then to have hidden evidence from the auditors
22 and the regulators. He was convicted of all 16 counts charged.
23 As here, the guidelines called for life in prison. But judge
24 Droney emphasized, "an important factor here that is different
25 from so many other corporate fraud prosecution's is that

D7f9cols1

Sentence

1 Mr. Graham did not personally gain in a direct way from his
2 criminal conduct and his motivation was not one of obtaining
3 direct personal gain." Judge Droney also noted that Graham,
4 "Did not have as active or central a role as other
5 participants."

6 The Court's been pointed to other white collar
7 sentencings in this district, Mr. Ebbers and others. In most
8 of these cases, those defendants were the business people who
9 not only planned, devised and initiated the fraud but enjoyed
10 enormous financial gains from those frauds. The case of Donna
11 Guerin is said to be a "reasonably close analogy" to this one.
12 She was an attorney recently sentenced for her sales of
13 fraudulent tax shelters in United States v. Daugerdas. The
14 analogy, however, is poor. As Judge Pauley noted at sentencing
15 Ms. Guerin's motivation was her "lust for money" and she sought
16 and received "stunning multimillion dollar compensation for her
17 crimes."As Judge Pauley stated at sentencing, "For Ms. Guerin,
18 it apparently has always been about the money. Even with all
19 the money she amassed, there is not a single letter submitted
20 to the Court on her behalf showing any meaningful commitment to
21 public service or charity beyond her college sorority that
22 encompassed activities like driving an elderly alumna to a
23 reunion celebration. In short, there are very few mitigating
24 circumstances here, just unchecked avarice. It is against that
25 backdrop that the Court is prepared to impose sentence on

D7f9cols1

Sentence

1 Ms. Guerin at this time."

2 Judge Pauley's sentencing remarks in Guerin emphasize
3 the distinctions between Mr. Collins and the heartland of fraud
4 defendants in his lack of personal gain, his limited role, and
5 his enormous and continuing prior charitable works.

6 Finally, as to restitution. The government does not
7 seek restitution here because of the overwhelming difficulty in
8 locating victims and calculating loss.

9 Taking all of those factors into account, counsel, it
10 is my intention to impose a sentence of incarceration of a year
11 and a day, followed by a period of two years of supervised
12 release.

13 It is my intention to impose only the special
14 condition of providing the probation officer with access to any
15 requested financial information.

16 It is not my intention to impose a fine.

17 As I mentioned, restitution and forfeiture are not
18 sought here.

19 It is my intention to impose the mandatory \$700
20 special assessment and to delete the drug testing requirement.

21 Is there any reason, counsel, such a sentence should
22 not be imposed?

23 MR. CHERNOFF: No, your Honor.

24 MR. SCHWARTZ: No, your Honor.

25 THE COURT: Very well.

D7f9cols1

Sentence

1 Mr. Collins, you're sentenced, sir, to a period of a
2 year and a day incarceration. Following that time you'll spend
3 a period of two years on supervised release. During that
4 period you'll comply with all of the standard terms and
5 conditions of supervised release. Among them are that you not
6 commit another federal, state, or local crime; you not
7 illegally possess a controlled substance; and you not possess a
8 firearm or other destructive device. In addition to those and
9 all of the other standard terms and conditions of supervised
10 release, you will also provide the probation officer with
11 access to any requested financial information. In light of the
12 lack of any substance abuse history, the drug testing
13 requirement is deleted.

14 And finally, sir, I must impose and do impose the
15 mandatory \$700 special assessment and that should be paid
16 promptly.

17 It is my duty to inform you, sir, that unless you've
18 waived it, you have the right to appeal this sentence and you
19 might have the right to appeal in forma pauperis, as a poor
20 person, with the waiver of certain fees and expenses.

21 Mr. Schwartz.

22 MR. SCHWARTZ: May I have a second, your Honor?

23 THE COURT: Yes, sir.

24 (Pause)

25 MR. SCHWARTZ: We would request that your Honor grant

D7f9cols1

Sentence

1 bail in this case pending appeal. I'm prepared to make an
2 argument if your Honor wants me to be heard at this time.

3 THE COURT: Does the government oppose bail pending
4 appeal?

5 MR. CHERNOFF: Yes, your Honor.

6 THE COURT: Mr. Schwartz.

7 MR. SCHWARTZ: First, your Honor, I'll just note as
8 background that by the time the appeal gets heard in this case
9 and decided Mr. Collins may well have served his entire
10 sentence. If he gets a year and a day and fifteen percent off
11 for good time, he will be out in less than a year. Given the
12 amount of time that the last appeal took and in a similar case
13 which your Honor is aware that I had where there was a sentence
14 of a year and a day, I believe he will have finished his
15 sentence.

16 There are -- as your Honor notes, the standard --
17 obviously, I take it I don't need to address whether
18 Mr. Collins is a danger to the community.

19 THE COURT: You can move on, Mr. Schwartz.

20 MR. SCHWARTZ: Your Honor, we have a couple of issues
21 on appeal that I think present substantial issues for the
22 Second Circuit, even though I know, given this Court's prior
23 rulings, you might disagree. But your Honor is also aware that
24 whether you agree or not is not determinative of whether the
25 issue is substantial.

D7f9cols1

Sentence

1 First, having to do with the Court's charge of
2 conscious avoidance. Two different judges have heard this
3 trial and one decided to give that charge, your Honor, and the
4 other didn't. We think that on its face raises on the same
5 facts the question of whether the charge was properly given.

6 I will note that conscious avoidance was clearly in
7 the forefront of the jury's mind as they deliberated.

8 One of their last -- it may have even been their last
9 note prior to verdict raised three different questions
10 surrounding conscious avoidance, whether I think -- I think it
11 was whether Mr. Collins -- an overt act could be conscious
12 avoidance, whether they could consider conscious avoidance --
13 whether you could have agreed to have been in a conspiracy
14 through conscious avoidance, and whether conscious avoidance
15 could be considered for intent as well as for knowledge.

16 So clearly there were at least some jurors who were
17 inclined to see this as a conscious avoidance case. And what
18 makes this case, we think, not a conscious avoidance case. I
19 think, respectfully, where the Court erred, is that what
20 Mr. Collins is stated to have done and what the government
21 argued in the charging conferences is to have not done; in
22 other words, to have been aware of a number of facts that
23 should have led him to conclude a crime was committed but then
24 not asked questions. So the affirmative act that's required --
25 conscious avoidance requires; one, that you have a knowledge of

D7f9cols1

Sentence

1 such -- a sufficient enough knowledge so that you can be
2 presumed to know that there's something that's very wrong and
3 then to take an act to avoid finding things out.

4 And I think what the government argued to the Court
5 was that essentially Mr. Collins didn't ask questions when he
6 could have asked questions. So we think that the charge was
7 not properly given.

8 But even if your Honor was correct in charging the
9 jury on conscious avoidance, we asked at the time that your
10 Honor charge the jury on the issue that -- charge the jury that
11 conscious avoidance is not recklessness.

12 And the Supreme Court has spoken to the issue of
13 recklessness in conscious avoidance in Global-Tech Appliances,
14 Inc. v. SEB S.A at 131 S. Ct. 2060, 2011. Your Honor, I do not
15 have the U.S. citation yet.

16 (Continued on next page)

17
18
19
20
21
22
23
24
25

D7f3col2

Sentence

1 MR. SCHWARTZ: But, I think what the Court says here
2 is pretty dramatic, and it's why we believe a conscious
3 avoidance is not reckless charge should have been given.

4 It says that conscious avoidance charge has two basic
5 requirements. They call it willful blindness --

6 THE COURT: Slowly. Slowly.

7 MR. SCHWARTZ: The Court refers to willful blindness,
8 but I think it's what we call conscious avoidance.

9 The requirements are that the defendant must
10 subjectively believe there is a high probability that a fact
11 exists; and two, the defendant must take deliberate actions to
12 avoid learning that fact.

13 Again, quoting from the Court: We think these
14 requirements give willful blindness an appropriately limiting
15 scope that surpasses recklessness and negligence. Under this
16 formulation, a willfully blind defendant is one who takes
17 deliberate actions to avoid confirming a high probability of
18 wrongdoing and can almost be said to have actually known the
19 critical facts. By contrast, a reckless defendant is one who
20 merely knows of a substantial and unjustified risk of such
21 wrongdoing. And a negligent defendant is one who should have
22 known of a similar risk.

23 We think given that standard and given what the case
24 was about, which were facts from which one could argue did he
25 know or did he not or was it merely a substantial probability,

D7f3col2

Sentence

1 that the jury should have been told recklessness is not enough.
2 And it would have enabled the defense, your Honor, in
3 summation, to really point out and go into the facts as being
4 possible recklessness, but not a conscious avoidance.
5 Something I had to avoid doing, given the Court's charge.

6 If the Second Circuit agrees with us, that -- your
7 Honor did charge it was not negligence, but if they agree it
8 was not negligence and it was not recklessness, then the entire
9 conviction will be reversed, so we've also satisfied that
10 element.

11 In addition, your Honor, given the conscious avoidance
12 charge, and the importance of that charge to the jury's
13 deliberation -- and I'll remind the Court, I believe the last
14 thing that Mr. Chernoff did in his rebuttal summation was read
15 the charge to the jury, the Court's charge on conscious
16 avoidance, which was a very powerful thing to do given the
17 circumstances in this case.

18 We believe that we should have been permitted to call
19 an expert to place into context what a lawyer does and what the
20 kinds of facts are that are available to a lawyer in the normal
21 practice of law, so that the jury could have determined whether
22 those facts had relevance with respect to what we think was its
23 determination that Mr. Collins consciously avoided, and didn't
24 ask questions that he probably properly should have asked.

25 And in our proffer to the Court, we had set forth the

D7f3col2

Sentence

1 kinds of things that we think would go, for example, if the
2 jury were to have decided -- and as you know from our
3 submission, I don't believe this is where the case was
4 decided -- but if they were to have decided the case on the
5 failure to ask questions about the back-to-back loans, they
6 would have been told by an expert that a lawyer isn't always
7 privy to every document in a transaction, and not always privy
8 to why a client does something. That would have been something
9 that would have helped them to evaluate conscious avoidance.

10 Finally, your Honor, we respectfully suggest that we
11 believe that the Court erred in not permitting the expert to
12 testify with respect to the facts and circumstances surrounding
13 the materiality of the proceeds participation agreement, and to
14 have given his opinion that the PPA would not have
15 significantly altered the mix of information available to
16 investors in a way that was material. Whether that would have
17 ultimately been couched in use of the word, what use of the
18 world "material" or not is something we didn't get to litigate.
19 And we had proposed different alternatives to the Court.

20 But the fact is that materiality, as we argued during
21 the trial, for all the counts in which Mr. Collins was
22 convicted, is an element. And is an element that must be
23 objectively determined. And that it would have been useful to
24 the jury to have heard how a lawyer, who was engaged in
25 transactions such as this for his entire career, our proffered

D7f3col2

Sentence

1 expert, would have interpreted the facts and circumstances
2 surrounding the proceeds participation agreement.

3 So, on that ground as well, your Honor, we think there
4 is a substantial issue about which I'm sure your Honor does not
5 agree with the conclusion that we reach, but the Second Circuit
6 may well, in which this conviction could be reversed. And we
7 ask your Honor to grant Mr. Collins bail pending a
8 determination.

9 THE COURT: Thank you. Mr. Levy.

10 MR. LEVY: Thank you, your Honor.

11 Your Honor, if I could first take up the issue of the
12 length of Mr. Collins' sentence. It is, as your Honor is
13 aware, not a part of the standard under Section 3143 whether or
14 not the defendant may have served his sentence by the time the
15 appeal has run. The standard is relatively simple. The
16 defendant needs to show that he's not a risk of flight, and I
17 think it's fair to say that the government is not contending
18 that he is. And then he also needs to show that the appeal
19 raises a substantial question of law. So the issue of whether
20 or not his sentence is going to run by the end is really not a
21 part of the analysis.

22 Let me address in reverse order the points that the
23 defense counsel has made. The issue of the expert is really
24 not a substantial question of law by any stretch of the
25 imagination. That is a discretionary decision of your Honor.

D7f3col2

Sentence

1 It was a decision that was made correctly. It is understood
2 that the defense disagrees with the decision, but the
3 possibility that the Second Circuit is going to conclude that
4 your Honor abused her discretion by determining that an expert
5 in matters of legal practice was unnecessary and should be
6 precluded in this case is really not a realistic possibility.
7 The Second Circuit -- I think it would be difficult to find a
8 decision in which the Second Circuit has done something like
9 that.

10 Moving to conscious avoidance. Although on the
11 surface it presents an issue that is somewhat meatier, the
12 Second Circuit has in recent weeks reached what is essentially
13 everything that the defendant proposes to make the basis for
14 the appeal.

15 With respect to whether or not a conscious avoidance
16 instruction in this case was appropriate at all, the Second
17 Circuit very recently said in United States v. Cuti, C-U-T-I.
18 It is a published opinion, but it is recent enough that I don't
19 think it has a full citation yet. It's 2013 WL 3197796. And
20 in that case, the Second Circuit said that the District Court
21 did not err in giving a conscious avoidance instruction. And
22 specifically it said that the defendant's purported lack of
23 knowledge defense, despite the defendant's deep involvement in
24 the transactions that effectuated the fraud, all but invited
25 the conscious avoidance charge.

D7f3col2

Sentence

1 It is identical here. This defendant claimed that he
2 was unaware of the nature of the transactions that he
3 personally participated in. And the Second Circuit has just
4 recently said that invites a conscious avoidance instruction.
5 So there is no substantial issue there.

6 As for Global-Tech --

7 THE COURT: I was going to ask you whether that Court
8 gave the it is not recklessness charge.

9 MR. LEVY: I don't know. I don't believe that came up
10 in Cuti. But, also within the last couple of weeks in United
11 States v. Goffer, G-O-F-F-E-R, also published but also too
12 recent to have a F.3d citation, it's 2013 WL 3285115. The
13 Second Circuit addressed this issue of whether an
14 anti-recklessness language needs to be included in a conscious
15 avoidance instruction. They said it did not. The language
16 from this opinion: Kimmelman urges us to believe -- I'm sorry.

17 Kimmelman alleges that the District Court erred in
18 declining to amend its jury instructions to accord with the
19 Supreme Court's ruling in Global-Tech. Specifically, Kimmelman
20 contends that the Global-Tech decision required the jury
21 charges indicate that, quote, the mental state of recklessness
22 is insufficient for a finding of conscious avoidance, closed
23 quote. Because Global-Tech did not alter the conscious
24 avoidance standard, we hold that the District Court's refusal
25 to amend the jury instructions to accord with Global-Tech was

D7f3col2

Sentence

1 not error.

2 So, the Second Circuit has within the last couple of
3 weeks resolved all of the issues having to do with conscious
4 avoidance that this defendant would raise on appeal. Given
5 that, he has no substantial issue to raise on appeal. And the
6 government submits that bail should be denied.

7 THE COURT: Mr. Schwartz.

8 MR. SCHWARTZ: I apologize to the Court because I have
9 not read the opinion that Mr. Levy has just referred to. But I
10 think that the Court has from time to time reversed on
11 conscious avoidance, and I think it is a very fact-intensive
12 inquiry they make.

13 What I was suggesting about Global-Tech is
14 particularly where there is not an affirmative act as opposed
15 to an affirmative non-act, and you're seeking from the evidence
16 to have an inference both that the defendant had knowledge of
17 the probability of wrongdoing and that the non-act was an act,
18 it is in that circumstance that a recklessness charge is
19 appropriate.

20 THE COURT: Anything else?

21 MR. SCHWARTZ: No, thank you, your Honor.

22 MR. LEVY: No, your Honor. Thank you.

23 THE COURT: Thank you.

24 As the government concedes, Mr. Collins is not likely
25 to flee or be a danger to the community. I do find, though,

D7f3col2

Sentence

1 that there is a substantial issue for appeal on all of these
2 matters, and accordingly, bail pending appeal will be granted
3 on the same conditions as it is now.

4 What else?

5 MR. SCHWARTZ: One more request, your Honor. We would
6 request that in the judgment the Court recommend to the Bureau
7 of Prisons that Mr. Collins serve his time at the federal
8 satellite prison camp in Oxford, Wisconsin, which is just a few
9 hours from Mrs. Collins' home outside of Chicago.

10 THE COURT: Yes, sir. Anything further?

11 MR. SCHWARTZ: No, your Honor.

12 THE COURT: Thank you, counsel. Good afternoon. Good
13 afternoon, sir.

14 MR. CHERNOFF: I'm sorry, your Honor. The government
15 would just move to dismiss the underlying indictment and open
16 counts.

17 THE COURT: So ordered.

18 o0o